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1976

# More on the Killy-Loo Bird

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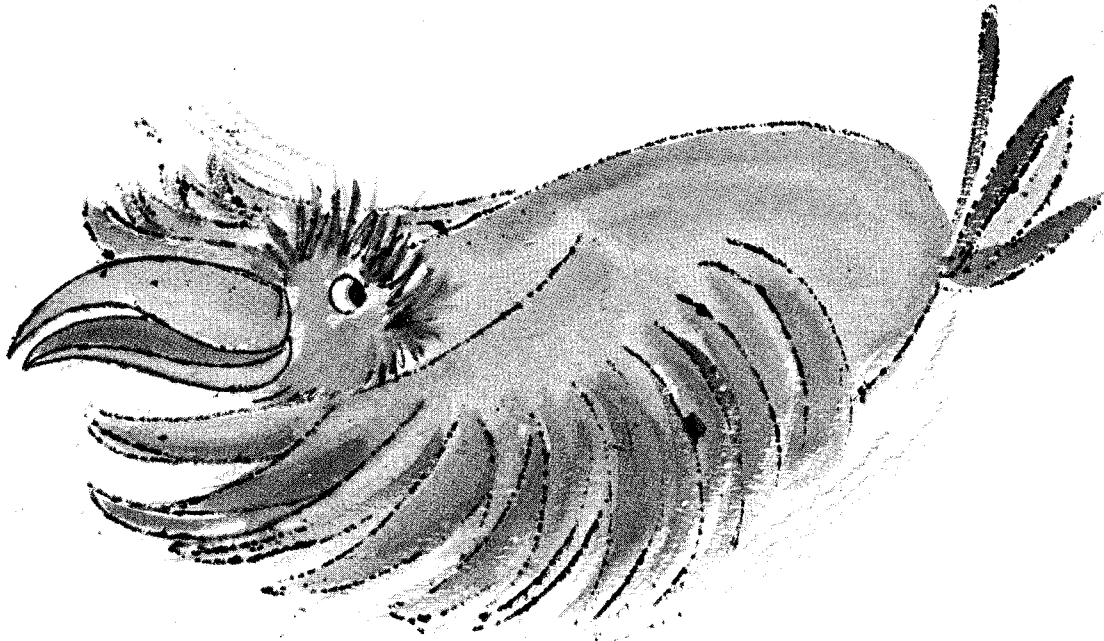
### Recommended Citation

Boshkoff, Douglass G., "More on the Killy-Loo Bird" (1976). *Articles by Maurer Faculty*. Paper 2131.  
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## MORE ON THE KILLY-LOO BIRD

**EDITORS' NOTE:** *The Summer 1976 LEARNING AND THE LAW was devoted to publication of papers presented at the "Conference on Education and Training for Competency Before Admission to Practice," sponsored by the Council on Legal Education for Professional Responsibility (CLEPR). In the rush to prepare these papers for publication, we inadvertently edited only a summary of Professor Douglass Boshkoff's presentation to the conference. It was published under the title, "Indiana's Rule 13: The Killy-Loo Bird of the Legal World." With apologies to Professor Boshkoff and our readers, we here present a full version of his paper.*

I am not unsympathetic to the assertion of judges that something ought to be done to increase the quality of client representation. But before we jump to action, we should try to understand where the quest for improved professional competence will take us.

In pursuing this inquiry I will ignore some problems that are quite often raised in discussions of Indiana's Rule 13 and the Second Circuit proposal, namely the possibility of balkanization of the practice of law attendant upon the adoption of a number of slightly differing versions of Rule 13 and the cost consequences for some schools associated with the Second Circuit Rule. One can make the argument that there were special circumstances in Indiana and that Rule 13 will not spread. I will assume that such an argument is faulty, that Rule 13 will spread. What may this mean in terms of professional training?

The most frightening characteristic of Rule 13, and to a lesser extent, of the proposal of the Clare Committee, is a terrible negativism. Many of you are probably familiar with Fred Rodell's characterization of the law as the killy-loo bird of the social sciences:

"The law is the killy-loo bird of the sciences. The killy-loo, of course, was the bird that insisted on flying backward because it didn't care where it was going but was mightily interested in where it had been. And certainly The Law, when it moves at all, does so by flapping clumsily and uncertainly along, with its eye unswervingly glued on what lies behind. In medicine, in mathematics, in sociology, in psychology—in every other one of the physical and social sciences—the accepted aim is to look ahead and then move ahead to new truths, new techniques, new usefulness. Only The Law, inexorably devoted to all its most ancient principles and precedents, makes a vice of innovation and a virtue of hoariness. Only The Law resists and resents the notion that it should ever change its antiquated ways to meet a changing world.

"It is well-nigh impossible to understand how The Law works without fully appreciating the truth of this fact: The Law never admits to itself that there can be anything actually new under the sun."

How true these words ring today as we discuss professional competence. I think a few quotations from statements by some supporters of either Rule 13 or the Second Circuit Rule will illustrate what I mean. First of all a quotation from a speech given by the then Chief Justice of the Indiana Supreme Court, Norman

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Arterburn, back in 1973: "We find that some law schools, and we are not directing our remarks to those alone in Indiana, do not require for graduation certain basic subjects such as Evidence, Contracts, or Constitutional Law to mention but a few. With such lack of direction over the course of study, students tend to take fringe courses related to sociology and philosophy of the law which may be desirable, but should not displace the fundamentals of the law. . . ."

Next, a pungent line contained in a paper by Mr. Robert Clare, Jr., submitted to the ABA Special Committee on Specialization for a conference held in June of 1974:

"... With the present day trend of allowing students to pick their own way through the courses, law firms soon learn to beware of students who have avoided bread and butter courses for the more esoteric subjects such as lives of the Chief Justices of the Supreme Court. . . ."

Finally, an excerpt from a resolution offered (and approved 117 to 5) by the Wabash County Bar Association to the House of Delegates at the April 24, 1975, Spring Meeting of the Indiana State Bar Association:

"AND WHEREAS, the members of the Wabash County Bar Association have been concerned in recent years that the tendency of law schools to substitute social awareness courses for basic law courses will have a tendency to lower the professional competence of practicing attorneys. . . ."

### **BLOCKING THE PATHS OF CHANGE**

The uniqueness of the Indiana rule and, to a lesser extent, the Second Circuit proposal is found in the fact that they, at least as measured by the declarations of some of their supporters, are motivated by a desire to stop law schools from changing. Certainly every reform proposal calls for a rejection of alternate values. But I am used to thinking of proposals for change in a positive sense: that is, there are new needs which must be met.

The Indiana rule says "go back to what we perceive as the old needs, reject your new values." I perceive less of this in the Second Circuit proposal because law schools are asked to do something which some of them have not done before—to provide extensive training in trial advocacy. I also find the Second Circuit rule distinguishable from the Indiana rule because the selection of courses in law school is only one of a number of ways to meet the requirement; therefore, the impact on the law schools is less severe.

Nevertheless, both rules are profoundly disturbing because they are supported, at least in part, by persons who believe that what is being done in law school is positively harmful or socially undesirable. The challenge to educational progress and academic freedom represented by these proposals is found not only in effect but also in motive.

Rule 13 has already had an adverse impact on legal education at Indiana University. It has accentuated the students' preoccupation with the problem of passing the bar examination. Rule 13 is an ever pre-

sent fact of life. The first thing a student thinks of today is, "Will this course satisfy Rule 13?" Students have always been conservative in course selection, and Rule 13 makes this tendency more pronounced.

We have seen substantial enrollment shifts with Rule 13 courses becoming very popular and non-Rule 13 courses suffering. This is unfortunate because the courses selected for inclusion in Rule 13 are not completely appropriate from the perspective of today's practitioners. It is a very conservative curriculum patterned on the conception of the general practitioner, a model that I do not think is particularly apt for a large number of our students today.

This encouragement of very traditional course selection by students is a difficulty we can weather. What I fear now is that the proponents of Rule 13, if they are serious (and I have no reason to doubt their dedication to the principle of prescribed courses), will soon want to do more. There are great differences between courses in the same subject area offered by different instructors. I predict a further intrusion into legal education by those who would prescribe certain courses. If one truly believes that a real property course is essential for the practice of law, it is impossible to be satisfied with the label on the course. A decision may soon be made to ask what the contents of the package are. I hope that such a question will never be asked, but I fear that it will. Opponents of Rule 13 do not often talk about this, but it is often on our minds.

Now let me turn to a related point. Rule 13 is bound to bring about a change in academic decision-making processes. Professor Robert Stevens has pointed out how lack of money, lack of interest in scholarship, lack of a clear conception of the role of legal education, and egalitarianism, and entrenchment within the law school faculties have made it very difficult to achieve any radical restructuring of American legal education:

"At the national law schools, fragmentation of the curriculum is much easier to achieve than is reform. As Lasswell and McDougal and those who follow them found, change is not likely to come quickly, if at all, within the law schools. They remain underfunded and overstructured, with faculties who are notoriously independent and at the same time schizophrenic about the role of law schools and legal scholarship. Reform is almost certain to come more slowly in the Bar Associations and Universities whose support will have to be achieved if radical reforms are to be undertaken. The dragon of legal history is still in the cave."

Professor Stuart Macaulay has also commented on the failure of Lasswell and McDougal to sweep the field of legal education:

"Lasswell and McDougal presented an elaborate proposal that would have made radical changes in legal education. While in one sense, this may have been a virtue, in another it was a great weakness. Legal education is an established institution, reflecting a wide variety of interests and seeking multiple, overlapping, if not conflicting, goals. As such, its changes are typically incremental rather than revolutionary."

Professor Macaulay points out that incremental decision-making, as opposed to radical restructuring, does not require the identification of roles, the investigation of consequences and the planning which are so difficult for a law school faculty to achieve. Rather it simply requires movement away from a present difficulty with the ever-present opportunity for retreat if the small experimental change appears to be a failure.

#### AN IMPACT ON INCREMENTALISM

Incrementalism is a good description of how most law faculties function. Courses appear and disappear, hours are added and subtracted, and subtle shifts in the curriculum take place. Individual faculty preferences and intellectual interests are a prime moving force in this curricular environment. Rule 13, however, makes it much more difficult, if not impossible, to function incrementally in the area of prescribed instruction. Every curricular change must be made only after it passes the Rule 13 test. If one is willing to compromise his principles, of course, I suppose Rule 13 is no bar to change. But if we act responsibly, no matter how much we object to the concept behind the rule, and try to satisfy it through the offering of traditional courses, then incrementalism, I believe, is a way of the past.

This impact of Rule 13 is not entirely unfortunate. At the very least it will direct our attention toward the need for a great deal of careful analysis of how change is to be effected in legal education. I have gone back over the Ehrlich-Packer report and the Carrington report looking for one thing: amid all the interesting

proposals for changes in legal education, was there any extensive discussion of how we were to get there? The answer is no.

In fact, I have found relatively little discussion of how one structure changes in education. There is ample recognition of the various factors which inhibit change, both inside and outside the law school, but little analysis of how one moves to change this situation. In fact, many people seem to assume that if the idea is good enough, the change will occur. A few years ago Michael Cardozo noted the need for accrediting agencies to protect innovative programs from constriction:

"I believe that it would be difficult to show that bona fide innovation, supported by the faculty of a law school, has been stillborn because of disapproval by either agency after due presentation and defense in the proper forum."

I would not dispute this assertion. But the most we can say is that accreditation standards do not prevent change. They are of no help at all in encouraging it. Now, after Rule 13, the situation becomes even more difficult. The one effective type of change process, namely the process of incremental change, becomes all but impossible.

Rule 13 confuses important information with essential knowledge. Nobody has ever suggested that most of the prescribed courses are not important. But so are many other courses which Rule 13 excludes. Any fragment of legal knowledge is absolutely essential to the lawyer who needs to use it. Practice opportunity defines educational need; law schools attempt to meet such situational needs by offering a wide variety of electives. There is relatively little we teach which must be mastered by every student who wishes to become a competent practitioner.

I believe that prior to the adoption of Rule 13 law schools were doing a good job of conveying to students those items of universally essential information which do not derive importance from specific practice opportunities. The rule now directs law schools to concentrate on information which one group of lawyers believes is important.

Once the practicing bar grasps the distinction between important and essential information, the philosophical weakness of the Indiana rule is revealed. I predict a rapid development of practitioner sophistication as proposals for mandatory continuing legal education proliferate. Minnesota recently adopted MCLE. We are told, however, that:

"The Minnesota rule requires no specific subjects in which courses must be taken. The matter was discussed, but the final conclusion was that individuals will normally enroll in subjects that have the greatest appeal and value to them which, in most instances, will also be those areas of the law in which most of their practice occurs. There was also recognition of the fact that the varieties of practice are so great that it would be virtually impossible to identify a core of essentials that everyone ought to have."

These are the same arguments advanced by law professors favoring a widely elective program of legal education. Perhaps there is still reason for hope. 